Supreme Court, U.S.
FILED

931994 APR - 7 1994

OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HAY'S WESTERN WEAR, INC.
Petitioner

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT, STATE OF LOUISIANA

MICHAEL K. DEES (LA Bar #4796)
McHALE, BUFKIN & DEES
COUNSEL OF RECORD
1901 Oak Park Blvd.
Lake Charles, LA 70601
(318) 478-2727

ERNEST C. HUNT, JR. (LA Bar #7053)
HUNT LAW FIRM

STEVEN C. MCGINITY (LA Bar #14206)

ATTORNEYS FOR HAY'S WESTERN WEAR, INC.

58 pp

APPENDIX A

JUDGMENT OF THE TRIAL COURT

APPENDIX B

WRITTEN REASON FOR JUDGMENT BY THE TRIAL COURT

APPENDIX C

OPINION OF THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA, NO. 92-1375

APPENDIX D

ORDER OF THE SUPREME COURT, STATE OF LOUISIANA DENYING WRIT OF CERTIORARI AND/OR REVIEW OF HAY'S WESTERN WEAR, INC.

APPENDIX E

KELLY V. LOUISIANA LIMESTONE AGGREGATE, NO. 92-1287, slip op. at SEPARATELY PAGINATED DISSENT (La. App. 3rd Cir., December 15, 1993) (DOMENGEAUX, C. J. AND YELVERTON, J. DISSENTING), Lake Charles American Press, December 23, 1993, at page 1, col. 5

APPENDIX F

EXHIBIT P-2, MAP OF THE CHLOE-MANCHESTER AREA

APPENDIX G

EXHIBIT P-12, CHRONOLOGY GRAPH OF MAJOR ROAD CLOSURES

APPENDIX A

JUDGMENT OF THE TRIAL COURT

HAY'S WESTERN WEAR, INC.	:	14TH JUDICIAL DISTRICT COURT
VS. NO. 83-6425	:	PARISH OF CALCASIEU
STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT	:	STATE OF LOUISIANA

FILED: AUGUST 28, 1992

JUDGMENT

This cause came up for trial. Present was the plaintiff, represented by its attorneys, Ernest C. Hunt, Jr., and Steve McGinity, and the defendant, represented by its attorney Ronald J. Bertrand. The Court considered the pleadings, the evidence, and the law, and being of the opinion for the written reasons assigned June 1, 1992, that judgment should have rendered in favor of the plaintiff, Hay's Western Wear, Inc., as follows:

It is ordered, adjudged, and decreed that there be judgment in favor of the plaintiff, Hay's Western Wear, Inc., and

against defendant, State of Louisiana, Department of Transportation and Development, in the sum of $67,849.00 together with legal interest from November 28, 1983, until paid, and in addition thereto, 25% of the total due as attorneys' fees incurred by the plaintiff.

It is further ordered that the defendant pay all costs of court including the expert fee of Dr. Michael Kurth which is set at $3,000.

Judgment rendered June 1, 1992, and read and signed this 24th day of August, 1992.

s/GREGORY D. LYONS
District Judge

Approved:

s/ERNEST C. HUNT, JR.
Ernest C. Hunt, Jr.
Attorney for Plaintiff

s/RONALD J. BERTRAND
Ronald J. Bertrand
Attorney for Defendant

APPENDIX B

WRITTEN REASON FOR JUDGMENT BY THE TRIAL COURT

HAY'S WESTERN WEAR, INC.	: 14TH JUDICIAL DISTRICT COURT
VS. NO. 83-6425	: PARISH OF CALCASIEU
STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT	: STATE OF LOUISIANA

FILED: JUNE 1, 1992

LYONS, Judge.

This matter came for trial on an allegation by Plaintiff, a small retail business, in the midst of a construction zone, stating that the road construction done by the State of Louisiana, Department of Transportation an Development, substantially interfered causing severe economic losses. Construction began on this project in March, 1980, and continued until early April, 1983.

Three principal issued appeared for consideration by the court

at trial. First, was the Plaintiff, as the lessee of the affected property, may maintain the action against the Defendant; second, was the Defendant substantially interfered with the Plaintiff's business amounting to a compensable expropriation; third, what damages did the Plaintiff suffer because of the Defendant's actions. After a careful and deliberate considerations by the court, it is the decision of this court to find for the Plaintiff on all issues and award damages.

The Plaintiff is clearly the proper party to bring suit in this matter for interfering with access to the property. The evidence is clear that on November 28, 1983, the Plaintiff did not own the land or buildings at the business location; but simply being the lessee of a parcel of real estate affected by road construction does not deny the Plaintiff a cause of action. See Holland vs. State Department of Transportation and Development, 554 So.2d 727 (La.Ct.App. 1989); Slocum vs. City of Baton Rouge, 536 So.2d 464 (La.Ct.App. 1988); and Kleinman vs. City of Lafayette, 493 So.2nd 890 (La.Ct.App. 1986).

The second issue was whether there was a cause of action

within the law which places upon the Defendant, a duty to act, or not to act. The question for this court to analyze is whether there was substantial interference with the access or ingress and egress to the property occupied by the Plaintiff. The facts indicated that on or about October 5, 1981, the Defendant, and its agents, began construction on the box culvert located between McCown Road and U.S. Highway 90, north of the Plaintiff's location. The Defendant closed the highway until February 26, 1982, cutting off access to the Plaintiff from the north. Customers had to detour to Louisiana States Highway 27 (Manchester Road) to McCown Road. On January 4, 1982, construction began on a new bridge over the Farmer's Land and Canal Company canal on Louisiana State Highway Number 27 (Manchester Road). The road was closed to traffic and remained closed to traffic until early 1983. This action did not immediately affect Plaintiff's business, but will play an important role later in the analysis of what occurred.

From February 26, 1982, until April 16, 1982, construction activities along Louisiana State Highway 397 occurred to the

north and south of the Plaintiff's location. On March 6 to March 9, 1982, north of the Plaintiff, the Defendant installed a cross-drain across the highway, closing the road and restricting access to the Plaintiff's business from the north. On March 10 to March 12, 1982, other work occurred south of the Plaintiff, closing the highway and denying access to the Plaintiff from the south. Various other activities took place south, and north, of the Plaintiff until April 16, 1982, carefully timed to avoid simultaneously closing the highway at both ends.

On June 7, 1982, the Defendant closed for repairs the Louisiana State Highway 397 bridge over Kayouchee Coulee near Joe Spears Road. With traffic blocked on Louisiana State Highway 27 (Manchester Road), access to the Plaintiff from the south was completely restricted. A customer arriving from the south could reach the Plaintiff only by detouring down Joe Spears Road to Boys Village Road, then north to McCown Road and back west on McCown Road to Louisiana State Highway 397, and then south through a construction zone; a detour of seven miles. Customers could access the Plaintiff by U. S.

Highway 90 from the north, but that approach was not always available. From June 22 to June 24, 1982, construction, north of the Plaintiff's location, between McCown Road and U. S. Highway 90, entirely blocked access to the Plaintiff by Louisiana State Highway Number 397. The only access to the Plaintiff from the north required a detour east to Louisiana State Highway Number 27 (Manchester Road) to McCown Road then west, then back south through a construction zone; a detour of three miles. McCown Road became the only access for the Plaintiff and its customers. The situation repeated on July 2, July 6, July 10, July 12, and July 13, when construction closed the highway north of McCown Road. There was testimony that the road would often be closed without notice, exacerbating the access problems to the Plaintiff's location. Customers might find the road blocked one hour and opened the next, or forced to seek a detour of as much as twelve miles.

This untenable situation become worse on July 16, 1982, when the Defendant ordered work on the box culvert north of the Plaintiff's location. The excavation and paving work on the box

culvert required closing the highway north of McCown Road from July 16, 1982 until September 2, 1982. With access from the south completely blocked during this period as well, the only access to the Plaintiff was by McCown Road and through a construction zone.

There is evidence of other interference with the Plaintiff's access or ingress and egress as well. During the construction on Louisiana State Highway Number 397, McCown Road was used as access to the construction site; traffic loads on McCown Road increased proportionately causing McCown Road to deteriorate to a condition at least as bad as the highway under construction. Expenditures by Calcasieu Parish for the maintenance of McCown Road increased during the construction period.

It also appears from the contractors work reports that when access was restricted both north and south of the Plaintiff's location, wet conditions often forced work to stop. The rain delayed construction and made a mess of the construction zone. Unpaved areas became seas of mud trapping unwary drivers. Construction traffic into and out of the construction site brought

mud and muck onto existing access roads making driving a dangerous task at best.

Another indication of the interference with the Plaintiff's right to access or ingress and egress was the placement of detour signs. Individuals approaching the Plaintiff's location on the highways, saw detour signs that gave no directions on where to go, how to reach the Plaintiff, or how to reach any other business located along the construction zone. Nor did the Defendant post any [sic ?signs?] an individual, to give directions for motorists wishing to visit businesses inside the construction zone.

The court also heard testimony that of the businesses located along the reconstructed portion of Louisiana State Highway 397, only two survived past the completion of the project; the Plaintiff, and a small convenience store located near a mobile home park whose only access was through the construction zone. The convenience store sold everyday staples such as bread, milk and, soap, servicing the two hundred families living nearby. Unlike the convenience store, the Plaintiff's customers did not

live inside the construction zone. By the Plaintiff's very location most of its customers lived west of the construction area. Only the most intrepid customers could brave the gauntlet of obstacles created by the Defendant to purchase their western clothing from the Plaintiff.

Common sense guides the court when considering the situation faced by the Plaintiff and others in the area. The residents of the trailer park had no other options than to endure the inconvenience. They could live with the inconvenience, move, or find temporary housing, but the Plaintiff's customers were not forced to suffer any inconvenience. When faced with the prospect of navigating a complicated construction zone, many of the Plaintiff's now former customers shopped elsewhere. Once lost those customers were not likely to return, despite even the heaviest of promotional efforts by the Plaintiff.

The Defendant did point out that when the highway was not mired down, continuous access was provided by some means, no matter how circuitous, to the Plaintiff and its customers. The issue that this court considers appropriate here, is not whether

there was access or whether the Defendant attempted to minimize the problems with the access, but whether the Defendant substantially interfered with the access or ingress and egress of the Plaintiff. The Plaintiff clearly demonstrated that the Defendant substantially interfered with Plaintiff's access or ingress and egress. It is clear from the courts personal knowledge of the area that people seeking to buy the products sold by the Plaintiff, would shop elsewhere when faced with the extreme difficulty and inconvenience of getting to the Plaintiff's business. The inescapable conclusion of the court is that between October, 1981, and September 1982, the Defendant's activities substantially interfered with the rights of access or ingress and egress of the Plaintiff.

The issue of damages must next be addressed. It is clear that the Plaintiff should only recover for the period during which the Defendant substantially interfered with the Plaintiff's rights of access or ingress and egress. After a careful review of the facts, the court finds that Hay's Western Wear, Inc., had their business substantially interfered with from October, 1981, until Septem

substantially interfered with from October, 1981, until September, 1982.

Assessment of economic loss is a question of facts analyzed from the evidence in the case. The court heard testimony of the Plaintiff's damages from the managers of the Plaintiff retailer, and from Dr. Michael Kurth, PH.D; an economist who conducted an analysis of the economic effect of the road construction on the Plaintiff. Dr. Kurth's analysis shows that highway construction from October, 1981, until September, 1982, caused the Plaintiff to suffer lost profits amounting to TWENTY ONE THOUSAND FIVE HUNDRED AND FORTY-NINE DOLLARS AND NO CENTS ($21,549.00).

Economic loss also includes losses other than lost profits for a retailer of soft goods, such as the western style clothing that Plaintiff sold from his store. Clothing inventory ages rapidly and items that to not sell quickly are marked down. Markdowns are a direct economic loss absorbed by the retailer. For the Plaintiff, Hay's Western Wear, Inc., the markdown amounted to FORTY TWO THOUSAND THREE HUNDRED DOLLARS

AND NO CENTS ($42,300.00), based upon a September, 1982, inventory value of $125,000 and allowing the retention of a 40% gross profit on the marked down items. Nor could the Plaintiff be expected to allow marked down inventory to languish on the racks. The situation forced the Plaintiff to conduct an extensive promotional campaign at a cost of FOUR THOUSAND DOLLARS AND NO CENTS ($4,000.00). The total of the Plaintiff's other additional economic losses would thereby amount to FORTY-SIX THOUSAND THREE HUNDRED DOLLARS AND NO CENTS ($46,300.00). The total damages suffered by the Plaintiff are SIXTY-SEVEN THOUSAND EIGHT HUNDRED FORTY-NINE DOLLARS ($67,849.00).

For the foregoing reasons the court awards the Plaintiff damages in the amount of SIXTY-SEVEN THOUSAND EIGHT HUNDRED FORTY-NINE DOLLARS ($67,849.00), with interest from the date of filing of the demand and all costs of this suit.

Without questions the Plaintiff sustained damages far more than the judgement, but the court can only award damages for

the period during which the Defendant substantially interfered and harmed the Plaintiff. Nor can the court award damages unless the Plaintiff can prove the amount of his losses. It is impossible for either the court, the parties or the experts to quantify the value of lost customers and other lost opportunities.

The court further orders that the expert witness fees for Dr. Michael Kurth in this matter be set at THREE THOUSAND DOLLARS AND NO CENTS ($3,000.00).

It is important to note that the Plaintiff should be compensated for all of his losses, not merely inconvenience and loss of profits. Article 1, Section 4 of the State Constitution indicates that full compensation should be granted to petitioner. The court determines that a reasonable and fair attorneys fees should be awarded to petitioner because it had an economic effect on petitioner's recovery and because of the protracted judicial proceedings in this matter. The court finds that after a careful review of the record and complexity of the issues, and the time spent in actual court on this matter, that attorneys fees in the amount of twenty-five (25%) percent of the award should

be rendered in favor of Plaintiff. Defendant is also ordered to pay all costs associated with the prosecution of this law suit.

A judgment to this effect will be signed when presented.

Lake Charles, Louisiana this 1st day of June, 1992.

s/ Gregory D. Lyons
District Judge

APPENDIX C

OPINION OF THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA, NO. 92-1375

NO. 92-1375

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

HAY'S WESTERN WEAR, INC.

PLAINTIFF-APPELLEE

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF

TRANSPORTATION AND DEVELOPMENT

DEFENDANT-APPELLANT

On appeal from the Fourteenth Judicial District Court, Parish of Calcasieu, Honorable Gregory D. Lyons, District Judge, presiding.

Dated Argued: September 1, 1993
Date Decided: October 6, 1993

BEFORE DOUCET, KNOLL, DECUIR, JJ.

DECUIR, Judge.

Plaintiff seeks damages caused by the widening of the highway in front of its retail establishment. The district court

awarded $67,849.00 for loss of business during the construction period plus ex: rt witness and attorney fees.

Essentially, The Department of Transportation and Development contends that its actions did not amount to a substantial interference with plaintiff's access to its property compensable under the law. Plaintiff contends that its property rights were subjected to an inverse condemnation by the diversion of traffic, circuity of travel, and inconvenience associated with DOTD's construction project.

The evidence reveals that plaintiff, Hay's Western Wear, Inc., operates a retail establishment in a leased facility located on La. Highway 397 in Calcasieu parish. From April of 1981 through April of 1983, construction work was done along a 5.111 mile stretch of Highway 397 on which plaintiff's establishment was situated.

During the period of construction access to Hay's was blocked either from the north or south, and for a period in both directions along Highway 397. However, at all times alternate access was available to Hay's, via gravel farm roads in the area.

The official state detour bypassed the area by access to other state roads, while actual access to Hay's at times required utilization of local roadways. Plaintiff did not allege that it was the only business in the area affected. In fact, the record reveals that at least two other businesses operated on the same stretch of Highway 397. In addition, a trailer park and other residential areas were in the area and subjected to similar inconvenience. Aside from occasional instances, the plaintiff ex: rienced no problem with maintenance of its driveways during the period. The driveways were gravel before construction and were maintained in that condition by DOTD during construction. Thus, plaintiff's only complaint is that its business suffered due to the inconvenience created by the construction project and, therefore, the DOTD deprived it of a constitutionally protected property right.

If a public authority substantially interferers with an owner's right of access, the owner has a cause of action under the constitution for just compensation Dickie's Sportman's Centers vs. Department of Transportation, 477 So.2d 744 (La.

App. 1st. Cir. 1985) writ denied 478 So.2d 530 (La. 1985). To sustain this inverse condemnation action a party must satisfy the following three prong test: 1) Has a recognized species of private property right been affected; 2) Has the affected property right been taken in a constitutional sense; and 3) Was the taking for a public purpose. State Through DOTD vs. Chambers Inv. Co., 595 So.2d 598 (La. 1992). Assuming that a recognized property right is affected for a public purpose, the complaining party must prove the presence of some type of ex: or abusive conduct in order to hold the State responsible. Chambers, supra.

Our jurisprudence is firmly established that damages caused by rerouting or diversion of traffic from one roadway to another are not compensable where the means of access to the premises are not substantially impaired or access is impaired on a temporary basis and/or the inconvenience to the owner is not peculiar to him but to the general public at large. Dickie's Sportsman's Centers, supra. Furthermore, points of entry and departure may be restricted for legitimate traffic safety reasons.

Skye Realty Co. vs. State Department of Highways, 345 So.2d 249 (La. App. 3rd cir. 1977).

In the present case the conduct in question was clearly for a public purpose. Therefore, the issue before us is whether DOTD's conduct in carrying out the construction project on Highway 397, was so excessive or abusive as to substantially interfere with a recognized property right of Hay's Western Wear, Inc.

The trail judge found that Hay's suffered a loss of business profits as a result of the construction on Highway 397 and that, under LSA-Const. Art. I, § 4, DOTD is liable to Hay's. We disagree.

Extensive testimony at trial revealed that at no time was access to Hay's completely blocked. In fact, in most instances access was available from either north or south on Highway 397 itself. At other times access was available, though inconvenient, by means of various local roadways. Several witnesses testified that the alternate access was hazardous, inconvenient, and unknown to many of Hay's customers. However, the evidence

revealed that there were other businesses on the same stretch of Highway 397 who were forced to endure the same inconvenience. No evidence was introduced to suggest that Hay's was somehow singled out by DOTD for inconvenient access. In fact, the record indicates that for the most part Hay's driveways were maintained in their pre-construction condition. Finally, Hay's produced no expert testimony to suggest that DOTD inappropriately conducted the construction project on Highway 397.

We were mindful that the factual determinations of the trial court are not to be disturbed on appeal unless clearly wrong. Rosell vs. ESCO, 549 So.2d 840 (La. 1989).

However, the record is devoid of evidence to suggest that the conduct of DOTD was excessive or abusive. Furthermore, it is clear that the inconvenience experienced by Hay's was not unique to it, but was experienced by the public at large in the area. Finally, Hay's access to its business was never completely blocked. As such, Hay's experienced no substantial interference with its access to its premises which is compensable

under our law. The trial court's factual findings to the contrary are clearly wrong.

We need not address DOTD's argument that economic damages are not recoverable as a property right, as we have found that Hay's suffered no compensable injury. For the same reason, DOTD's contention that expert witness and attorney fees were erroneously awarded has merit.

For the foregoing reasons, the judgment of the trial court is reversed, and Hay's Western Wear, Inc.'s petition is dismissed with prejudice. Hay's Western Wear, Inc. is taxed with all costs.

REVERSED.

APPENDIX D

ORDER OF THE SUPREME COURT, STATE OF LOUISIANA DENYING WRIT OF CERTIORARI AND/OR REVIEW OF HAY'S WESTERN WEAR, INC.

THE SUPREME COURT OF THE STATE OF LOUISIANA

HAY'S WESTERN WEAR, INC.

VS. NO. 93-C-2767

STATE OF LOUISIANA,
DEPARTMENT OF TRANS-
PORTATION AND DEVELOPMENT

- - - - - -

IN RE: Hay's Western Wear Inc.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA92-1375; Parish of Calcasieu Fourteenth Judicial District Court Div. "A" Number 83-6425

- - - - - -

Dated: January 7, 1994

Denied.

PFC

WFM

JLD

HTL

PH

WATSON & ORTIQUE, JJ., would grant the writ.

KIMBALL, J., not on panel.

APPENDIX E

KELLY V. LOUISIANA LIMESTONE AGGREGATE,
NO. 92-1287, slip op. at SEPARATELY PAGINATED
DISSENT (La. App. 3rd Cir., December 15, 1993)
(DOMENGEAUX, C. J. AND YELVERTON, J. DISSENTING)

NO. 92-1287

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

PATRICK "DALE" KELLEY

Plaintiff / Appellant

VERSUS

LOUISIANA LIMESTONE AGGREGATES, INC.
and CYRUS INDUSTRIAL MINERALS COMPANY

Defendants / Appellees

Dated: December 15, 1993

DOMENGEAUX, C.J., dissenting.

I respectfully suggest that the majority opinion represents a dramatic departure from the recognized rules of appellate review. I feel rather embarrassed to repeat some of them here, but at the risk of redundancy, do so in the hope that it may benefit some who do not know they exist.

The Louisiana Supreme Court in the case of Rosell v. Esco, 549 So.2d 840 (La. 1989), summarized in manifest error/clearly wrong standard, as follows:

> It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. Arceneaux v. Domingue, 365 So.2d 1330, 1333 (La. 1978); Canter v. Koehring, 283 So.2d 716, 724 (La. 1973). See also Sevier v. United States Fidelity & Guaranty Co., 497 So.2d 1380, 1383 (La. 1986); West v. Bayou Vista Manor, Inc., 371 So.2d 1146, 1150 (La. 1979); Davis v. Owen, 368 So.2d 1052, 1056 (La. 1979); Cadiere v. West Gibson Products Co., 364 So.2d 998, 999 (La. 1978); A. Tate, "Manifest Error" Further observations on appellate review of facts in Louisiana civil cases, 22 La. L. Rev. 605, 611 (1962). The appellate review of fact is not completed by reading only so much of the record as will reveal a reasonable factual basis for the finding in the trial court, but if the trial court or jury findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them

cannot be manifestly erroneous or clearly wrong. Arceneaux, supra at 1333, Watson v. State Farm Fire & Casualty Ins. Co., 469 So.2d 967 (La. 1985). In applying the manifestly erroneous--clearly wrong standard to the findings below, appellated courts must constantly have in mind that their initial review function is not to decide factual issues de novo. See, F. Maraist, The Work of the Louisiana Appellate courts for the 1978-1979 Term -- A Faculty Symposium, Civil Procedure, 40 La. L. Rev. 761, 764 (1980); Comment, Appellate Review of Facts in Louisiana Civil Cases, 21 La.L.Rev. 402, 412 (1961); Cf. Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

When findings are based on determinations regarding the credibility of witnesses, the manifest error--clearly wrong standard demands great deference to the trier of fact's findings; for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Canter, supra at 724; Virgil v. American Guarantee & Liability Ins. Co., 507 So.2d 825, 826 (La. 1987); Boulos v. Morrison, 503 So.2d 1, 3 (La. 1987); Williams v. Keystone General Contractors, Inc., 488 So.2d 999, 1001 (La. 1986); Johnson v. Insurance Co. of North America, 454 So.2d 1113, 1117 (La. 1984); Berry v. Livingston Roofing Co., 403 So.2d 1247, 1249 (La. 1981); Crump v. Hartford Accident & Indemnity Co., 367 So.2d 300, 301 (La. 1979). Where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a

> reasonable fact of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. See, Wilson v. Jacobs, 438 So.2d 1119 (La. App. 2d Cir. 1982), writ denied, 443 So.2d 586 (La. 1983). Cf. State v. Mussall, 523 So.2d 1305 (La. 1988); Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); U.S. v. U.S. Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948). But where such factors are not present, and a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. See Jackson v. Tate, 428 So.2d 882, 884 (La. App. 1st Cir. 1983), citing McDonald v. Book, 215 So.2d 394(La. App. 3d. Cir. 1968), overuled on other grounds, Celestine v. Hub City Motors, Inc., 327 So.2d 700 (La. App. 3rd. Cir. 1976). Cf. Anderson, supra, at 575, 105 S.Ct. at 1512; Schexnider v. McDermott International Inc., 868 F.2d 717, 720 (5th Cir. 1989); Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752, 770 (5th Cir. 1989); U.S. v. Hibernia National Bank, 841 F.2d 592, 595 (5th Cir. 1988); Hanson v. Veterans Administration, 800 F.2d 1381, 1388 (5th Cir. 1986). (Footnote omitted.)

549 So.2d at 844-845.

Credibility calls are the function and prerogative of the trial court. Holmes v. International Paper Co., 559 So.2d 970 -

(La. App. 2d Cir. 1990); Bruno v. Harbert Intern. Inc., 593 So.2d 357 (La. 1992).

In Bailey v. Smelser Oil & Gas Inc., 620 So.2d 277 (La. 1993), the Supreme Court, citing LSA-R.S. 23:1221(1)(c) for the "clear and convincing" burden of the plaintiff in proving temporary total disability, added:

> While the worker's compensation laws are to be construed liberally in favor of the claimant, that interpretation cannot lessen the plaintiff's burden. [Citations omitted.] Disability can be proven by medical and lay testimony. The trial court must weigh all the evidence, medical and lay, in order to determine if the plaintiff has met his burden. [Citations omitted.] This factual finding should be given great weight and should not be overturned absent manifest error. [Citations omitted.] (Emphasis added.)

620 So.2d at 279-280

In the case of Culp v. Belden Corp., 432 So.2d 847 (La. 1983), our Supreme Court reiterated the standard of review as follows:

> On appellate review, the trial court's factual findings concerning work-related disability should be given great weight and should not be disturbed where the evidence before the trier of fact supports a reasonable

factual basis for the trial court's findings, unless clearly wrong. (Emphasis added.)

432 So.2d at 851.

In the case of Bruno v. Harbert Intern, Inc., 593 So.2d 357 (La. 1992), the trial court held for plaintiff, the court of appeal reversed and the Supreme Court reversed the court of appeal, stating:

> In determining whether the worker has discharged his or her burden of proof, the trial court should accept as true a witness's uncontradicted testimony, although the witness is a party, absent "circumstances casting suspicion on the reliability of this testimony." West, 371 So.2d at 1147; Holiday v. Borden Chemical, determinations as to whether the worker's testimony is credible and whether the worker has discharged his or her burden of proof are factual determinations not to be disturbed on review unless clearly wrong or absent a showing of manifest error. Gonzales

> v. Babco Farms, Inc., 535 So.2d 822, 824 (La. 1988) (collecting cases). Indeed, the manifest error/clearly wrong standard of appellate review applies in compensation actions even when the trial court's decision is based solely upon written reports, records or depositions. Virgil v. American Guarantee and Liability Insurance Co., 507 So.2d 825 (La. 1987).

593 So.2d at 361.

In the case of Williams v. Regional Transit Authority, 546 So.2d 150 (La. 1989), the trial judge accepted the testimony of one physician and rejected that of another; the court of appeal reversed, and the Supreme Court, in recognizing the trial judge's prerogative, held:

> It is well established that the trial judge has considerable discretion in accepting rejecting expert testimony, and that the trial judge's decision to accept the testimony of one one expert over another should not be disturbed absent manifest error. [Citations omitted.]

546 So.2d at 157.

On the question of proof of causation, the Louisiana Supreme Court in Prim v. City of Shreveport, 297 So.2d 421 (La. 1974), stated:

> Although procedural rules are construed liberally in favor of workmen's compensation claimants, the burden of proof, by a preponderance of the evidence, is not relaxed. Thus, the testimony as a whole must show that more probably than not an employment accident occurred and that it had a casual relation to the disability. If the testimony leaves the probabilities equally balanced, the plaintiff has failed to carry the burden of persuasion. Likewise, the plaintiff's case must fail if the evidence shows only a possibility of a causative accident or leaves it to speculation or conjecture. [Citations omitted.]

297 So.2d at 422.

For an excellent reference to the standard of appellate review generally and the restraints imposed on the reviewer concerning factual matters, see the concurring opinion of Justice Ortique in Thomas v. Highlands Ins. Co., 617 So.2d 877 (La. 1993).

Following are the reasons advanced by the trial judge in the case sub judice:

This matter came before the court on a worker's compensation claim for injuries sustained by the plaintiff while employed by the defendant. The issues before the court are whether plaintiff is entitled to supplemental earnings benefit after being fired from employment in 1985, and whether medical expenses after July 6, 1984 should be paid, and also whether penalties and attorneys fees should be awarded to plaintiff for the failure of defendant to pay compensation timely.

The court after a careful consideration of the evidence finds that plaintiff failed to establish by a preponderance of the evidence that any complaints of pain or injury after July 6, 1984, were related to on job injuries sustained by plaintiff in February of 1984. The vast majority of and the huge weight of the evidence, clearly favors the position of the defendant. Numerous exams of the plaintiff reflect no disability related to the accident, with the exception of Dr. Gol's records. The court finds that the evidence of limited problems presented by the defense far outweigh the testimony favoring the position of the plaintiff.

It is clear the opinion of Dr. Foster stated below is the opinion of a number of doctors seen by plaintiff. The court adopts this opinion as most convincing based upon viewing the witnesses, and weighing the evidence. Dr. Foster stated:

> The subject complaints far outweigh any physical findings as he has no objective findings. I do believe that he is sincere and probably still has some slight residual from his straining injury but not enough to prohibit him from continuing work. There is no reason why he can't fulfill his usual occupation as a heavy equipment operator.

It is evident that any problems plaintiff had after terminating his employment in 1985 was not related to his on the job injury. Thusly no medical is recoverable by plaintiff that was incurred after July 6, 1984.

For the foregoing reasons it should be immediately obvious that no penalties or attorneys fees are due in this matter.

The court hereby renders judgment in favor of the defendant and against the plaintiff dismissing plaintiff's claims at plaintiff's costs.

A judgment to this effect will be signed when presented.

Lake Charles, Louisiana this 7th of February, 1992.

In denying plaintiff's motions for new trial, the judge said:

> This matter came for hearing before the court on a motion for new trial from a judgment rendered by the court in this matter on February 18, 1992. After carefully reviewing the record again and hearing the arguments of counsel, the court finds that the motion for new trial should be denied. The court reiterates its reasons for judgment in the previous opinion.
>
> A judgment to this effect will be signed when presented.
>
> Lake Charles, Louisiana this 5th day of June, 1992.

DISCUSSION

As a prelude to a discussion of the legal evidence contained in the record, it is interesting to note that a less than subtle attempt is made in the majority opinion to refer to the plaintiff's use of "Percodan" allegedly prescribed by a Dr. H. L. Snider. At oral argument one of the attorneys indicated that Dr. Snider is a dentist. The majority opinion recognizes that the record is silent as to the reason this medication was prescribed and, in fact, recognized that the "Percodan" was prescribed for

something other than plaintiff's alleged back injury. Notwithstanding, and based on pure unadulterated speculation and self service, the majority opinion states that the Percodan, without a doubt, was an effective aid to plaintiff to control his back pain between August 2, 1984 and November 21, 1984. Thus, the majority herein has, in effect, created and relied on its own "evidence"!

A careful reading of the majority opinion leaves no doubt that it is based on the conclusions of the chiropractor-Dr. Bauer and the Houston neurologist, Dr. Gol. Dr. Gol did state that it was reasonable to assume that the pain which plaintiff complained of when he returned in June 1985 was a recurrence of the original pain, but he also said that it was not possible to exclude a new injury as the cause of the complaints of pain in June 1985.

Except for Drs. Bauer and Gol, the conclusions of all of the other medical experts were unfavorable to plaintiff.

Dr. Clark Gunderson and Dr. Shamieh, physicians chosen by plaintiff to treat him for his February 1984 injury,

released him to return to work in July of 1984.

Dr. Dale Bernauer, who consulted by plaintiff in May of 1986, concluded, after diagnostic testing on plaintiff, that there was no treatment he could offer because plaintiff's complaints did not correlate with the physical findings of the tests.

Dr. Veca saw plaintiff on December 26, 1985 and found no objective evidence regarding plaintiff's continued complaint.

Dr. Romero saw plaintiff in February, April and May of 1984. He found spasms in February and April 1984 and diagnosed plaintiff as having a lumbosacral strain. Plaintiff's last visit to Dr. Romero was on May 21, 1984, at which time plaintiff still persisted to have low back pain in spite of treatment. He found no neurological defects.

Dr. Looney saw plaintiff on February 21, 1984. His report states that plaintiff's X-rays were normal and that the physical examination was "not remarkable."

Referring back to Dr. Gunderson, a reading of his entire deposition makes it clear that whatever problems plaintiff had as of January 1990 were not related to his accident of February

1984. His one isolated response to a hypothet posed by plaintiff's attorney was that it was probable that plaintiff's alleged back problems were related to the February 1984 accident. His responses before and after that statement were couched in the realm of "possible" situations. Eliminating the typical stratagem utilized in the deposition to wile [sic] the doctor from his well-considered opinion, it is clear how Dr. Gunderson stood: Plaintiff's complaints were not referable to the 1984 event.

The neurologist, Dr. Foster, examined plaintiff on August 30, 1984. He received a report of the various tests which had been previously performed on plaintiff, including CT scan, EMG, and myelogram. He also knew that plaintiff had some physical therapy. He was apprised of the fact that plaintiff had previously been seen by Drs. Gunderson, Romero, and Shamieh. His report, which was used by the trial judge as an example of the opinions of a vast majority of the other physicians who saw plaintiff, was to the effect that plaintiff had received a lumbar strain injury of moderate severity and that plaintiff's subjective complaints far outweigh any physical findings as to any objective

findings. He thought plaintiff was sincere and probably still had some slight residual from his straining injury, but not enough to prohibit him from continuing work. The doctor said there was no reason why plaintiff could not fulfill his usual occupation as a heavy equipment operator.

The trial judge was confronted with some credibility questions concerning the legitimacy of plaintiff's complaints in view of the medical evidence, the reason plaintiff was terminated from his job, and certain circumstances concerning activities during the 13 month period from the time he returned to work and the time he became separated from his job.

Plaintiff's job with defendant at the time of his February 1984 injury was that of a heavy equipment operator. He operated a Caterpillar 966-C front end loader and a A-6 bulldozer. The Caterpillar weighed about 20 tons and the dozer about 30 tons. To operate either machine required active use of the arms, legs, feet and body. This is not a cream puff job.

It is obvious that the trial judge did not think it reasonable that a person, complaining as plaintiff allegedly did,

could carry on this strenuous work for 13 months. That circumstance, coupled with the vast majority of the medical evidence, not to mention credibility , obviously caused the district judge to rule against plaintiff.

Applying the rules of appellate review stated above to the circumstances of this case, it is inconceivable that this case should be reversed.

In overruling the trial judge, the majority throws the rule books out of the window.

I respectfully dissent and would affirm the district ruling.

LAKE CHARLES AMERICAN PRESS,
December 23, 1993, at page 1, col.5

RIFT BETWEEN APPEAL COURT JUDGES GROWING.

A growing rift between new and some veteran judges at the Third Circuit Court of Appeal in Lake Charles has the Southwest Louisiana legal community talking.

The problem stems from a high number of court cases overturned this year by five-judge panels a the appeal court.

The court's five new judges -- Billie Woodard, John Saunders, Gene Thibodeaux, Sylvia Cooks and Oswald Decuir -- were elected last year. In many of the overturned cases, at least two new judges on five-judge panels voted with the majority to overturn.

Area lawyers won't talk publicly about the controversy because they may have to bring cases before the judges.

One question they raise, however is just what the court of appeal is supposed to do -- and not do -- when it reviews cases.

In most instances, the courts look for "manifest error" in cases. That means appeal judges can overturn a trial court decision if there is no reasonable basis for it. The appeal court is not supposed to second guess a trial jury or judge its decision.

A dissent opinion, issued last week by Senior Appeal Court Judge Jerome Domengeaux, has apparently brought the issue to a head. The opinion concerned a civil case overturned by the appeal court, and is one of Domengeaux's last opinions before he retires at the end of this year.

Domengeaux was critical of the judges who voted to overturn the case, saying: "Applying the rules of appellate review stated above to the circumstances of this case, it is inconceivable that this case should be reversed.

"In overruling the trial judge, the majority throws the rule book out the window."

Contacted at his Lafayette office Wednesday, Domengeaux said he had no comment about his opinion or reports of problems between the judges on the appeal court.

"It's not proper for a judge to comment about those matters. My opinion is self-explanatory," he said Wednesday.

"I have been on the Court of Appeals for 23 years. It has been my policy not to comment on opinions that I'm involved in. The documents speak for themselves."

Judge Thibodeaux denied any rift between the new and old judges. He admitted there is some friction, but said this is likely when there are 12 different personalities on the appeal court.

"The cases are not being reversed because of a failure to adhere to appellate rules and procedures," he said.

Those reversals by five-judge panels on the Third Circuit Court which have been heard by the Louisiana Supreme Court were upheld.

Two possible reasons for the number of cases overturned are the nature of the cases and a change in the court's makeup, Thibodeaux said.

"I think it's safe to say -- and it's not an exaggeration -- that the philosophical makeup of court has shifted," he said.

"You are going to have different legal philosophies and different methods of interpretation whenever you have 12 different judges. I wouldn't elevate that to a rift. I would say it's a shift in philosophy."

Thibodeaux wasn't on the five-judge panel which overturned the case concerned in the Domengeaux dissent opinion.

Of the opinion, Thibodeaux said: "Because there is criticism doesn't mean the rules of appellate review haven't been followed. It's an existing question of how you interpret those rules."

Thibodeaux said all of the judges respect each other and work together though there are a lot of "strong opinions."

Domengeaux wrote his opinion on the Patrick Kelley versus Louisiana Limestone Aggregates case. It was heard by 14th Judicial District Court Judge Gregory Lyons. Kelly lost the case, but won it on appeal before the Third Circuit.

"Applying the rules of appellate review stated above. . . it is inconceivable that this case should be reversed," Domengeaux wrote. "In overruling the trial judge, the majority throws the rule books out of the window."

In this case, Lyons dismissed Kelly's suit against his employer for supplemental earnings and medical expenses incurred after July 6, 1984. It was found by the court that they were unrelated to his on-the-job injury sustained Feb. 6, 1984.

Kelly appealed the case, stating that he was entitled to supplemental earnings benefits after Aug. 20, 1985, his last day of work, and medical expenses after July 6, 1984.

A five-judge panel of Domengeaux, Henry Yelverton, Jeannette T. Knoll, Saunders, and Woodard heard the appeal. The panel reversed the court's decision by a 3-2 vote with Woodard, Saunders and Knoll voting to overturn.

Judge Knoll is not a new judge. She is serving her second term on the appeal court.

In his dissent opinion, Domengeaux shows his displeasure with what the majority had done.

"I respectfully suggest that the majority opinion represents a dramatic departure from the recognized rules of appellate review," he wrote.

"I feel rather embarrassed to repeat some of them here, but at the risk of redundancy, do so in the hope that it may benefit some who do not know they exist."

The senior judge cites a Louisiana Supreme Court case which states that a court of appeal may not set aside a finding by a trial court or a jury unless there is "manifest error" or unless it is "clearly wrong."

"Where there is conflict of testimony, reasonable evaluation of credibility, and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel its own evaluations and inferences are as reasonable."

The judges review the case from typed transcripts of the court proceedings, and do not have the benefit of hearing and watching the actual witnesses in the case.

Yelverton dissented in the Kelley case for the same reasons Domengeaux did, court documents show.

Initially, the appeal court's decision was stamped: "Not designated for publication." This means the case would not appear in legal journals which cite important cases heard by the appeal courts and Louisiana Supreme Court.

However, a letter was issued two days after this decision was rendered. It stated: "The panel has since decided that the opinion and accompanying dissent should be published."

A legal brief filed by Lake Charles attorney Jim Doyle, who represented the company in this case, touched on the controversy about the appeal court's action on reversals.

Anyone litigating any substantial amount of cases before this court knows that 1993 has been a banner year for five-judge panels, which are compiled only when two judges vote to reverse a trial court's findings in a civil case," Doyle wrote.

"In addition to the fact that trial judges are being reversed routinely the way trial judges are being reversed should be of some concern to those who desire certainty in appellate review," he wrote.

The brief describes getting information from the Third Circuit Court on five-judge panels as "a difficult process."

"In several phone calls, undersigned counsel was ultimately told that no such statistics were available," Doyle wrote.

Doyle was told by Kenneth deBlanc, Clerk of Court, that the only source from which this information could probably be gleamed" was "heldover sheets," according to the brief.

These sheets "are private and intended for circulation only among members of the court. But in comments from other practicing lawyers, it is clear that 1993 has seen an explosion of five-judge panels," he wrote.

Doyle said in his brief that he has had three cases go before the appeal court through Nov. 15, and all three ended up before a five-judge panel.

"In the previous 17 years, this counsel has had 19 cases before the various circuit courts of appeal and never until 1993 had a five-judge rehearing," he wrote.

Doyle found in his research the Third Circuit Court of Appeal has reached opinions in 13 cases this year as of mid-November involving five-judge panels.

"Two of those involve five-judge opinions which have not, for one reason or another, been released for publication," he wrote.

The Third Circuit Court only issued two such opinions in 1990, one in 1991 and one in 1992, according to his brief.

In comparison, Doyle found the First Circuit Court of Appeal in Baton Rouge and Second Circuit Court of Appeal in Shreveport have each issued one opinion as of Nov. 15 involving a five-judge panel.

The Fourth Circuit Court of Appeal in New Orleans issued three opinions involving five-judge panels during the 11 months, but two of the cases were election-related and not civil cases, Doyle wrote.

There were no five-judge panel opinions issued by the Fifth Circuit in Gretna in the same period.

STATE OF LOUISIANA

AFFIDAVIT

PARISH OF CALCASIEU

BEFORE ME, the undersigned authority, personally came and appeared ERNEST C. HUNT, JR., Louisiana Bar Number 7053, one of the attorneys for Hay's Western Wear, Inc., who deposed and said:

This map attached to this affidavit with notations shown thereon depict the area and roads controlling the affected area where Hay's Western Wear, Inc.'s business was located on Louisiana Highway #397 in Calcasieu Parish, Louisiana.

My office has been advised this week by the Office of the Clerk of the Louisiana Court of Appeal, Third Circuit, that Exhibit P-2 (map of the affected area) which depicted that area has been lost by the Court and cannot be located.

We have attached a photocopy of an official Calcasieu Parish, Louisiana map for that area without which testimony in Civil Action Number 83-6425, Division A, of the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana, would make little sense.

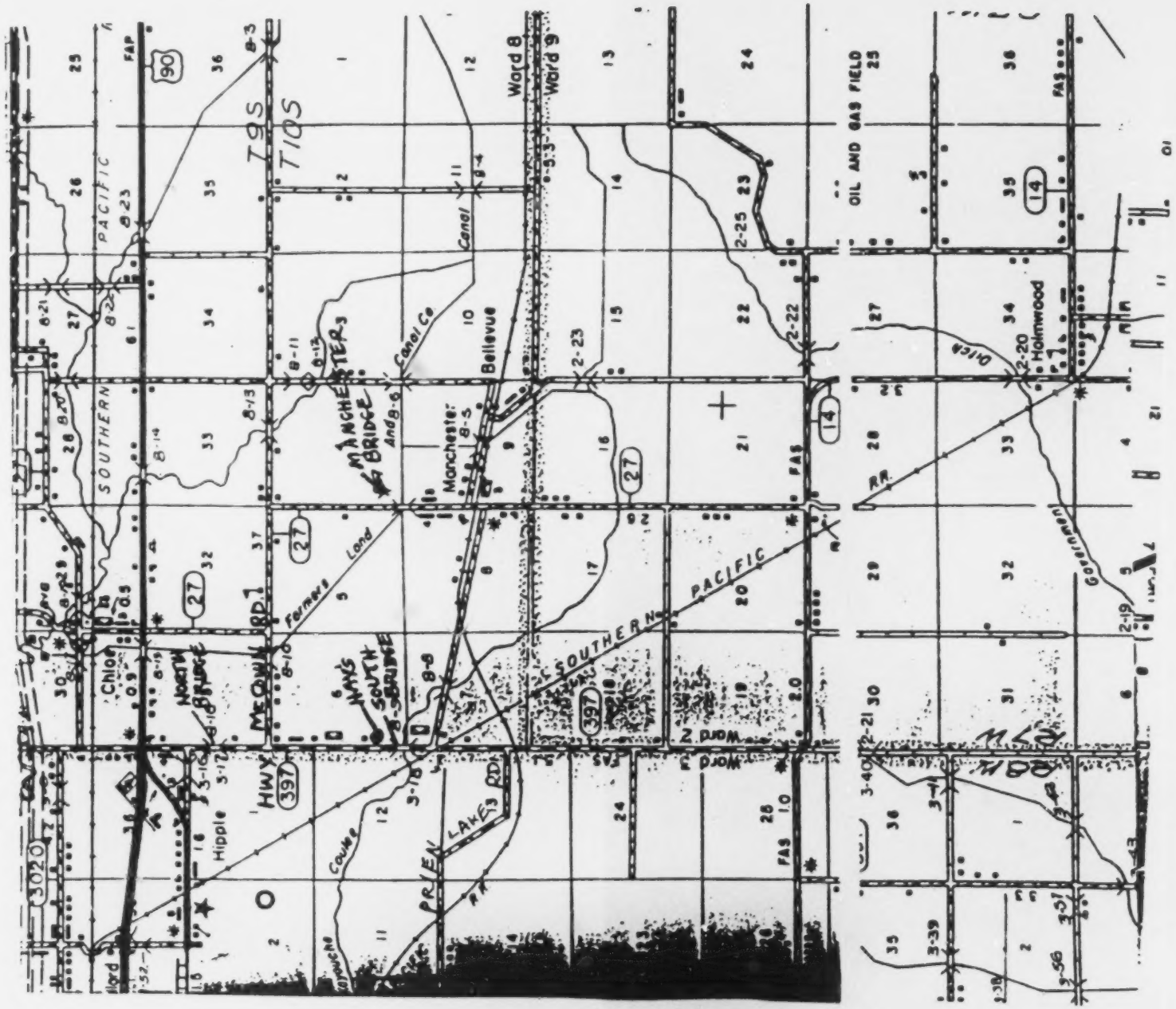
s/ERNEST C. HUNT, JR.
ERNEST C. HUNT, JR.

SWORN TO AND SUBSCRIBED before me this 7th day of April, 1994, at Lake Charles, Louisiana.

s/MARILYN F. WILLIAMS
NOTARY PUBLIC

APPENDIX F

EXHIBIT P-2, MAP OF THE CHLOE-MANCHESTER AREA



APPENDIX G

EXHIBIT P-12, CHRONOLOGY GRAPH OF MAJOR ROAD CLOSURES

P-12